

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

.....  
In the matter of: .  
THE ARC OF SOUTH NORFOLK, .  
Employer, . Case No. 01-RC-213174  
and .  
AMERICAN FEDERATION OF STATE, .  
COUNTY & MUNICIPAL EMPLOYEES, .  
COUNCIL 93, .  
Petitioner. .  
.....

**THE ARC OF SOUTH NORFOLK’S BRIEF ON REVIEW OF THE ACTING  
REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

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## INTRODUCTION

The Arc of South Norfolk, *Inc.* (“The Arc”) respectfully submits this Brief on Review of the Acting Regional Director’s Decision and Direction of Election. Petitioner American Federation of State, County & Municipal Employees, Council 93 (the “Union”) filed a petition seeking to represent a bargaining unit consisting of all of The Arc’s Relief Staff, Assistant Case Managers, Case Managers, Licensed Practical Nurses, Physical Therapy Assistants, and Program Coordinators. Because of the extensive supervisory authority possessed by the Program Coordinators, The Arc sought to exclude the Program Coordinators from the bargaining unit based on their role in the hiring, assignment and direction of the work of their subordinates, and their role in discipline. Nevertheless, the Acting Regional Director found the Program Coordinators not to be supervisors and, therefore, included them in the bargaining unit along with Relief Staff, Assistant Case Managers, and Case Managers.<sup>1</sup>

Accordingly, The Arc filed a Request for Review of the Acting Regional Director’s decision. In its Request for Review, The Arc argued that the Acting Regional Director’s decision was premised on three fundamental flaws. First, the Acting Regional Director disregarded almost all of the evidence showing that Program Coordinators are supervisors and, instead, based his decision on purported exceptions testified to by the Union’s witnesses that in actuality prove the rule. Second, the Acting Regional Director misapplied and/or disregarded Board (and Supreme Court) law regarding “effective recommendation” of supervisory authority, ruling instead that the recommendations must be “binding” to be “effective”, even though his interpretation of Section

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<sup>1</sup> The Licensed Practical Nurses and Physical Therapy Assistants were not included in the certified bargaining unit because The Arc challenged their inclusion on the grounds that they did not share a sufficient “community of interest” with the other employees in the proposed unit. This issue was not resolved and, accordingly, the Licensed Practical Nurses and Physical Therapy Assistants were excluded from the certified bargaining unit.

2(11) reads the “effectively to recommend” provision out of the statute. Third, the Acting Regional Director held that the Program Coordinators did not possess supervisory authority because he believed that The Arc had not provided enough examples of the exercise of that authority, thereby conflating the possession of authority with its exercise. *See infra* at 15-16. A proper assessment of the facts and application of the law to those facts, The Arc argued, should have resulted in the Acting Regional Director finding that the Program Coordinators were statutory supervisors.

The Board granted The Arc’s Request for Review on the issues of whether the Program Coordinators possess the authority to assign or responsibly direct employees within the meaning of Section 2(11) of the Act, 29 U.S.C. § 152(11), but otherwise denied the Request for Review.

Proper application of the Board’s prior decisions leads to the conclusion that the Program Coordinators possess such authority and, therefore, are statutory supervisors. Given the responsibility and authority that the Program Coordinators have in the primary indicia of directing the work of Case Managers, Assistant Case Managers, and Relief Staff – as well as making Case Manager, Assistant Case Manager, and Relief Staff assignments – the Program Coordinators clearly meet the test for supervisory status under the Act. Added to this is their role and authority with respect to such secondary indicia as approving time off, oversight and training of the documentation process, and performance evaluations of Case Managers. Moreover, The Arc treats Program Coordinators as supervisors, paying them a salary like other senior managers in contrast to Case Managers, Assistant Case Managers, and Relief Staff who are hourly employees, and including the Program Coordinators in key decisions about the structure of the Day Habilitation Program and in The Arc’s management training program. Finally, the testimony of the only Case Manager to testify at the hearing clearly showed that Case Managers consider their Program

Coordinator to be their supervisor with authority and control over the Group Room and the day-to-day work that the Case Managers, Assistant Case Managers, and Relief Staff perform.

Once the Board remedies the Acting Regional Director's errors in relying upon unsupported factual findings, disregarding most of the evidence adduced at the hearing, and applying an incorrect standard for establishing supervisory status, it will be clear that the Program Coordinators are supervisors that should not have been included in the bargaining unit.

Accordingly, The Arc urges the Board to reverse the Acting Regional Director's decision, hold that the Program Coordinators are statutory supervisors, and dismiss the Union's petition because it is seeking an inappropriate bargaining unit.

## **BACKGROUND**

### **I. The Arc and Its Organizational Structure.**

The Arc is a private, nonprofit organization that provides supports and services to individuals with developmental and intellectual disabilities and their families. Among other programs, The Arc offers a Day Habilitation Program, which is designed to develop independent living skills for its participants. It operates at two locations: Westwood, Massachusetts and West Roxbury, Massachusetts. A total of 65 employees work in the Day Habilitation Program, which is overseen by Program Director Lisa Knox ("Knox"). (Tr. 14, 21.) Two Senior Associate Directors, Diane DeMeritt ("DeMeritt") at the Westwood location and Andrew Smith at the West Roxbury location, assist Knox with her duties and oversee the clinical aspects of this program. (Ex. E-1, Tr. 17-18.) Each participant in the program is assigned to a Group Room, each of which includes about 10 to 14 participants with similar levels of functioning and support needs. A Program Coordinator is assigned to each Group Room and is responsible for the day-to-day activities that take place in the Group Rooms. As Vice President Daniel Sullivan ("Sullivan") testified:

Q. Can you tell us what the program coordinator's job entails? What do they do?

A. The program coordinator is responsible for the overall operations of their room. Again, each room is unique. The individual is in the room. Unique schedules differ. It is the responsibility of the coordinator to lead the team of case manager, assistant case manager in meeting the needs of the program participants. They coordinate activities; oversee again the day-to-day operations of their room.

(Tr. 32-33).

Each Program Coordinator, in turn, supervises a staff of two or more Case Managers or Assistant Case Managers as well as any Relief Staff working in his or her room. (Ex. E-2 (Job Description for Case Managers stating that Case Managers report to Program Coordinators); Ex. E-3 (Job Description for Assistant Case Managers stating that Assistant Case Managers report to Program Coordinators); Ex. E-4 (Job Description for Relief Staff stating that relief staff report to Program Coordinators); Tr. 32 (Testimony of Vice President Daniel Sullivan – “Q. Now the way you’ve described relief staff moving around, they may be supervised by different program coordinators? A. Correct. Once they are assigned to their room, depending upon which room they are in, the program coordinator of that room would have responsibility for directing that person in their room.”); Tr. 258 (Testimony of Program Coordinator and Union witness Stefanie Furlong – “Q. Okay. ‘Each program coordinator supervises staff of two or more case managers or assistant case managers.’ A. It’s true.”)).

Typically, the Program Coordinator and Case Managers have a case load of four to six participants. (Tr. 23.) The Program Coordinator for each Group Room is responsible for assigning caseloads to Case Managers. (Tr. 24.) The Program Coordinator and Case Managers are both responsible for helping assigned participants work toward goals specified in the participants’ Service Plans, documenting their progress against objective criteria, and with personal care, such

as toileting and feeding. (Ex. E-2, Tr. 21-24.) Case Managers generally assume greater responsibility for personal care matters. (Ex. E-2.) Assistant Case Managers do not have assigned caseloads and provide support as needed and directed by the Program Coordinators in each the Group Room. (Ex. E-3.) They assist primarily with personal care and do not have documentation responsibilities. (Ex. E-3, Tr. 27-28.) Finally, The Arc has a number of Relief Staff who float to different Group Rooms to cover Case Managers and Assistant Case Managers who are absent. (Ex. E-4, Tr. 29-30.) Case Managers, Assistant Case Managers, and Relief Staff all report to the Program Coordinators. (Tr. 25, 29, 32, Ex. E-2, E-3, E-4.)

In sum, each Program Coordinator is responsible for a Group Room (Tr. 33, 46.), and it is the Program Coordinator's responsibility to lead his or her team of Case Managers, Assistant Case Managers, and Relief Staff in meeting the needs of the program participants in his or her Group Room by coordinating activities and overseeing the day-to-day operations of their rooms. (Tr. 33, 46.)

## **II. The Program Coordinators' Authority.**

### **A. Direction of Work and Staff Assignments.**

The Arc's witnesses consistently testified that the Program Coordinators are responsible for overseeing what happens in their Group Rooms. Tr. 84-85 (Testimony of Vice President Daniel Sullivan – "Q. Have any program coordinators in your tenure been disciplined because of the failure on the part of their subordinates to meet a particular performance standard? A. There was a program coordinator who was the subject of a performance improvement plan based on her actions in the group room, if that's what you're asking."); Tr. 131-132 (Testimony of Senior Associate Director Diane DeMeritt – "Q. What happens if the program coordinator doesn't do that? A. If the program does not tell us that? Ultimately, they are responsible for the documentation or lack thereof. Q. Has there ever been an instance to your knowledge where a

program coordinator was disciplined because of a failure to follow-up on poor documentation by a case manager? A. Yes. ... Q. So the program coordinator was put on a performance improvement plan for not overseeing the documentation properly? A. Correct.”).

They are the senior staff person in their Group Room as no other senior manager is regularly present. Although the Program Coordinators solicit input from their staff, they ultimately determine what the program and activities are in their Group Room based upon the needs of the participants assigned to their Group Room. Tr. 20 (Testimony of Vice President Daniel Sullivan – “Q. Just briefly, is somebody responsible for managing what goes on in the group room on a day-to-day basis? A. Program coordinators are responsible for the operations of each of the 10 rooms. Each program coordinator is responsible for their room.”); Tr. 112 (Testimony of Senior Associate Director Diane DeMeritt – “Q. Are the programs and activities in alt day A, B, and C different from the programs and activities in group 7? A. All the group rooms, their programs and activities are different. The program and activities are set up and designed by the program coordinator. The program coordinator is the person who is going to a) [sic] establish the schedule in the group room. They are going to set up the activities based on what’s written in their day hab service plan so that folks can be carrying them out. Program participants are different. There are different toileting schedules, different feeding schedules. So they’re all different.”).

As Senior Associate Director Diane DeMeritt testified at the hearing:

Q. [H]ow are the activities come up with in a group room?

A. The program coordinator is the supervisor in the room, so the program coordinator sets up, designs, is responsible for making sure that goals, objectives are being carried out. So each group room is different. Each style of program coordinator is different in how they want to implement their rooms and how they want to – how much involvement they want from their case managers. We have program coordinators that are very much getting their case managers involved like a team. I have other case managers who choose to run

Q. Program coordinators?

A. Yes, program coordinators, thank you. Program coordinators that choose to run their classrooms in a very different way, like this is my plan and I'm just going to tell you what we're going to do. ...

Q. Who has the final say in a group room as to what the program set of activities is going to be?

A. The program coordinator.

Q. Is that true for every program coordinator?

A. That is true for every program coordinator.

Q. So if a case manager wants to do a specific activity and the program coordinator does not want that activity to be done?

A. They can veto it."

(Tr. 147). *See also* Tr. 290 (testimony of Program Coordinator and Union witness Stefani Furlong – "Q. So, what happens if you all can't agree? I mean, it sounds like you are running your room like – by committee. So, what happens if there's disagreement among all of you? Does somebody have the ultimate responsibility to make a decision? A. Yes, ultimately. Q. Who? A. Myself.").

Likewise, Case Manager Kurt Boreri testified:

Q. So, when you say that you have been included in the decision making –

A. Yeah.

Q. – what does that – what does that mean?

A. That the PC will ask for the staff's input and take into consideration their consideration or their feelings and thoughts before making a final decision.

...

Q. So, the staff isn't making any final decisions about the activities?

A. No, because from what I understand, my understanding is the PC doesn't have to – have to do what the case managers want. I mean that's – that's the whole

point of the position. They can overrule the case managers, but a good manager, a good PC will – will always ask for staff input.

Q. But would you describe it as a, kind of, you know, decision made by committee? I mean, do the staff have a right to make the decision?

A. No.

Q. So, it's the – so, we're clear, the program coordinator has the – the authority to decision [sic] what the activities are?

A. Correct.

(Tr. 251-252.)

Similarly, the Program Coordinators assign each of their Case Managers a caseload which they have the authority to change. Tr. 24 (Testimony of Vice President Daniel Sullivan – “Q. Who assigns a case manager their caseload? A. The program coordinator.”); Tr. 98 (Testimony of Vice President Daniel Sullivan – “Q. Within the group room, all right, who assigns the caseload to the case managers? A. The program coordinator.”); Tr. 105 (Testimony of Vice President Daniel Sullivan – “Q. Then when this new person is assigned to group 1, who makes the decision as to what, which staff person that person is added to that staff person's caseload? A. The program coordinator would assign the caseload.”); Tr. 128-29 (Testimony of Senior Associate Director Diane DeMeritt – “Q. Are staff assignments ever changed within a group room? A. They can be, yes. ... Q. Is there a process for a change being made? A. The program coordinator would make that change. Q. Does the program coordinator need approval from anyone else to make that change? A. No. The program has the – program coordinator has the authority to make that change.”); Tr. 157 (Testimony of Program Director Lisa Knox – “Q. Who assigns the caseloads to the case managers? A. The program coordinators.”).

Austin Udemagwuna, a Program Coordinator, testified that he just did that with a new Case Manager, Genevieve Barco, and that his decision about her case load was final. He testified in detail as to the discretion he exercises in assigning caseloads:

Q. What criteria do you use in making the match?

A. Personally, the criteria that I use is I look at the – the skills and experience of the new staff and see if she's capable of handling, dealing with especially the guardian or the parent that I'm assigning her to.

If I see that the guardians or the parent of the individual are very, very demanding, I do want to handle that because I'm already – I've already established a relationship with the parent or the guardian. So, the preference – I mean the criteria that I use is to make sure she's able to relate with the – with the guardian or the parent of the individual.

Q. So, these are all very individualized decisions?

A. Correct.

Q. And some – I take it that some guardians and parents can be more difficult to manage than others?

A. Yeah, right.

Q. So, you're – you're making a determination whether that case manager could handle that situation?

A. Right.

Q. Some can? Some can't?

A. Some can't, yeah.

Q. When you assigned Genevieve her caseload, did you need anybody's approval –

A. No.

Q. – as to those assignments?

A. No. There was no influence from any other – any person at all.

(Tr. 204-205.)

Lisa Knox testified similarly. Tr. 157-158 (“Q. How does a program coordinator decide who is assigned a client or a participant to which staff person in their room? A. It’s actually – it’s an exciting process because we are completely relying on the program coordinator to look at the whole person, to look at the individual holistically and look at their interest, their capabilities, how they would respond to a particular staff person. And then the program coordinator’s task was matching, making a suitable match so that that individual can succeed in reaching their goals and objectives. Q. Their decision about assigning staff to client does not require anybody’s approval other than program coordinator? A. Absolutely not. Q. They’re never overruled? A. Never.”). Udemagwuna also testified that when he was a Case Manager before being promoted to a Program Coordinator, each of the three or four Program Coordinators he worked under over the years assigned him his caseloads. (Tr. 206.)

Kurt Boreri, a Case Manager from a different Group Room, similarly testified that the Program Coordinators he has worked under assigned him his caseloads:

Q. Who assigned you your caseload?

A. Meryl [a Program Coordinator].

Q. What about when you were working at the Arc in 2010, did you have a caseload?

A. Yes.

Q. And did somebody assign you your caseload –

A. Yes.

Q. – then?

A. Yes.

Q. Who?

A. Then PC Karina.

(Tr. 245.) This was supported by Knox and DeMeritt.

DeMeritt in particular testified that although she puts a letter in each client's file documenting who their Case Manager is, this is merely an administrative step that is required by state regulation. Tr. 127 ("Q. Who makes the assignment of the participant to a case manager? A. The program coordinator makes the assignments of caseloads. I will then get a list of those assignments so that that information can be entered into our database. Then a form letter is drafted as according to our regulations."). Clearly the Program Coordinators exercise the authority to assign the caseloads to their Case Managers, and their decisions are not subject to approval or veto by more senior management. Tr. 127-28 (Testimony of Senior Associate Director Diane DeMeritt – "Q. Does the program coordinator's decision with respect to a staff assignment of a case require the approval of anyone other than the program coordinator? A. No, it does not. Q. Has it ever? A. No, it never has.>").

The Program Coordinators also decide which staff person in their Group Room will oversee each activity that occurs in the Group Room based on their assessment of the skills of their staff. None of their decisions require approval from more senior management. Tr. 209 (Testimony of Program Coordinator Austin Udemagwuna – "Q. So, the assignment of activities, you have the final say? A. I have the final say.>"). As Austin Udemagwuna testified, "I fashion the program for the day, but they help to implement those programs." (Tr. 192.)

Finally, it was clear from the testimony that the Program Coordinators must use independent judgment in making decisions about assigning caseloads and determining what programs and activities will take place in their Group Room. Tr. 158 (Testimony of Program Director Lisa Knox – "Q. Does the decision of matching a staff person with a participant involve any kind of judgment call? A. It involves complete judgment and being sensitive to the

individual's needs, even taking into consideration family preferences. So it's a lot of thought and judgment goes into this decision. Q. So there's no manual that they can look at that you've written that says, okay, follow this and this is how you match them up. A. No."); Tr. 158-159 (Testimony of Program Director Lisa Knox – "Q. I want to ask you about the activities that go on. How does the program in a room get developed? A. The program coordinator completely oversees every aspect of planning from activities to daily schedule, monthly activities. They'll host building-wide activities. They'll hold – host specific classroom activities. They are complete [sic] responsible for the design and implementation, and all of the activities. What the program coordinators do a particularly wonderful job at is identifying what people are working on, and then taking those goals and objectives and incorporating activities. They're completely responsible for their classroom design and those activities."); Tr. 261 (Testimony of Testimony of Program Coordinator and Union witness Stefanie Furlong – "Q. "Sure. 'It is the responsibility of the program coordinator to assess the needs of each participant in the group room and to decide staff assignments and what activities are appropriate.' A. Yes."); Tr. 245 (Testimony of Case Manager Kurt Boreri – "Q. Okay. Who decides what activities take place in your group room? A. Ultimately, it's the program coordinator.").

As everyone agreed, each Group Room is different because the clients are different. Some Group Rooms have highly functioning clients and some have very low functioning clients. This necessitates that the programs and activities be tailored to the needs of the particular clients in the Group Room. Tr. 112 (Testimony of Senior Associate Director Diane DeMeritt – "Q. Are the programs and activities in alt day A, B, and C different from the programs and activities in group 7? A. All the group rooms, their programs and activities are different. The program and activities are set up and designed by the program coordinator."). It is the Program Coordinator's

responsibility to design the program for their Group Room, and they must make judgments in designing their program, selecting activities and assigning staff responsibilities for clients and activities. Tr. 337 (Testimony of Program Coordinator and Union witness Ellen Wall – “Q. Give me an example of something that you have the authority to decide. A. I think I do kind do [sic] decide for what we’re doing for activities in the room.”).

B. Compensation.

Program Coordinators are salaried, exempt employees, like more senior management, and are paid about \$6,000 more per year than Case Managers. (Tr. 34, 336.) Case Managers, Assistant Case Managers, and Relief Staff are hourly, non-exempt employees. (Tr. 24, 28, 30.)

C. Treated as Supervisors by the Employer and Staff.

As testified by Kurt Boreri, a Case Manager, the Program Coordinators are viewed by the staff in their Group Rooms as having the final say about what happens in the Group Room. (Tr. 245-246, 251-252.) They are the boss. When the staff have meetings in the Group Room, the Program Coordinator decides when to hold the meeting, determines the agenda and conducts the meeting. (Tr. 163, 164.)

Program Coordinators also have separate meetings with senior management to discuss program-wide issues that affect all of the Group Rooms and to share information about what activities are effective or not. (Tr. 164-165.) They are the conduit for communicating this information to their staff.

When The Arc held a management training program, the Program Coordinators participated in the training program along with senior management. (Tr. 49-51; Ex. E-10.) Case Managers were not included in the training program. (Tr. 50.)

Similarly, when The Arc needed to eliminate a Group Room, it sought input from the Program Coordinators and in the end adopted the consolidation plan proposed by the Program

Coordinators. (Tr. 35-46; Ex. E-6, E-7, E-8.) The Program Coordinators also were intimately involved in redistributing both clients and staff. Case Managers had input into this process only through their Program Coordinator.

The Program Coordinators clearly are viewed by both The Arc and the Day Habilitation Program staff as part of management with significant authority to make decisions that affect the working conditions of the staff and the operations of The Arc. Tr. 160 (testimony of Program Director Lisa Knox – “Q. Can you tell me what criteria you use in selecting a program coordinator? A. I look for somebody with wonderful leadership qualities. Somebody who is excited about taking charge and creating programs. Somebody who is innovative. Somebody who is excited to serve and see people accomplish their goals.”). The Program Coordinators even refer to themselves as “supervisors” when signing off on time off requests, performance evaluations, and community outing approval forms. (Ex. E-22(a)-E-22(f)), E-23-E-26, Ex. E-27(a)-E-27(e).) Contrary to the belief of the Acting Regional Director, they are not just another Case Manager in their Group Room who simply lead discussions by the staff in order to reach group decisions.

## **ARGUMENT**

### **I. The Standard.**

Only “employees” have the right to bargain collectively under federal law. 29 U.S.C. § 157. The Act defines the term broadly (and somewhat circularly, *see id.* § 152(3) (“shall include any employee ...”)), but excludes “any individual employed as a supervisor,” *id.* A “supervisor” is any individual who, while acting in the interest of the employer, uses independent judgment to carry out any one of the enumerated job tasks listed in Section 2(11).<sup>2</sup> 29 U.S.C. § 152(11). The

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<sup>2</sup> Section 2(11) of the NLRA defines the term “supervisor” as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection

Act thus creates “a three-part test for determining supervisory status.” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712–13 (2001). Individuals are supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” 29 U.S.C. § 152(11); *see Kentucky River*, 532 U.S. at 713. It is well-established law that an individual only needs to possess *one* of the twelve listed indicia to be a supervisor (so long as the other two elements of the statutory test are satisfied). *See, e.g., Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007) (“An individual need possess only one of the enumerated indicia of authority in order to be a statutory supervisor, so long as the exercise of such authority is carried out in the interest of the employer and requires the use of independent judgment.”); *Extreme Bldg. Servs. Corp. & Local 78, Asbestos Lead & Hazardous Waste Union, Laborers Int’l Union of N. Am.*, 349 NLRB 914, 918 (2007); *Local One, Int’l Union of Elevator Constructors of N.Y. & N.J.*, 339 NLRB 977, 981 (2003); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001); *Entergy Sys. & Serv., Inc.*, 328 NLRB 902 (1999) (“The statutory language is disjunctive, and the exercise of any one of the listed indicium is sufficient to make that individual a supervisor.”); *Queen Mary*, 317 NLRB 1303 (1995); *Allen Servs. Co., Inc.*, 314 NLRB 1060, 1061 (1994); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Albany Med. Ctr.*, 273 NLRB 485, 486 (1984).

Furthermore, when carrying out an analysis of whether an employee possesses supervisory authority, it is well-established law that “the question of supervisory status is determined by whether or not the individual possesses supervisory authority, not by whether or not the individual

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with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

*exercises such authority.*” *Formco, Inc.*, 245 NLRB 127, 129 n.7 (1979) (emphasis in original). *See also Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007) (“Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise.”); *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999) (“we do not draw a distinction between those account representatives who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such account representatives possess the authority to do so”); *Wasatch Oil Refining Co.*, 76 NLRB 417, 423 fn. 17 (1948) (“The Board has held that employees with acknowledged supervisory authority may be found to be supervisors although they have never exercised such authority.”).

Where these qualifications are met, then the individuals must be found to be statutory supervisors under the Act; as such, they are ineligible for representation, and cannot be included in any certified unit for purposes of collective bargaining.

## **II. The Acting Regional Director Erred in Finding that Program Coordinators Lack Authority to Assign and Direct the Work of Their Subordinates.**

The Acting Regional Director’s conclusion that Program Coordinators do not possess the statutory authority to assign or responsibly direct the work of their subordinates is wrong. The Acting Regional Director’s reasoning was two-fold. First, he found that there was no evidence that Program Coordinators were accountable for their direction. Second, he believed that the Program Coordinators did not exercise independent judgment. Neither justification fits the facts of what the Program Coordinators actually do.

The record is uncontested that the Program Coordinators oversee everything that happens in their Group Room and assign and direct the work of Case Managers and other staff in their room in the process. According to the Board, the term “assign” is the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a

shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.” *Oakwood Health Care, Inc.*, 348 NLRB 686, 689 (2006). However, in assigning duties, an individual must do more than make “ad hoc instruction that the employee perform a discrete task.” *Id.* Instead, the individual must have the authority to designate “significant overall duties to an employee,” thereby affecting the terms and conditions of his or her employment. *Id.* In *Oakwood Healthcare*, the Board found that certain nurses met the statutory definition of “assigning” work because they made assignments tailored to patient conditions and needs and particular nurses’ skills, among other factors. They also gave the employees specific instructions, which included “significant overall tasks to an employee.” In light of this, the Board reasoned that those decisions had a material effect on the terms and conditions of staff employment, and the “assignment” prong was satisfied. *Id.* at 695.

Program Coordinators have the same type of assignment authority as the nurses in *Oakwood Healthcare*. Repeated testimony demonstrated that the Program Coordinators assign each of their Case Managers a caseload, based on their perception of their Case Managers’ levels of experience and skills, and participant needs. Moreover, Program Coordinators ultimately determine what the program and activities are in their Group Room and also decide which staff in their Group Room will oversee particular activities in the Group Room. And, notably, Program Coordinators make these determinations based on their own perception of the needs of the participants assigned to their Group Room and the best way to implement the participants’ rehabilitation plans so that the participants can achieve the goals set forth in those plans. In all, the Program Coordinators assign the staff in their Group Rooms to particular tasks, and delegate the staff to individual assignments. By making these assignments, the directives of the Program Coordinators have an obvious material effect on the terms and conditions of their staff’s

employment – indeed, the Program Coordinators effectively determine what the staff in their Group Rooms will do all day. As such, the manner in which the Program Coordinators assign their staff to particular participants and duties based on a Program Coordinator’s assessment of the proper pairing of his or her staff’s experience, skills, and aptitude with the needs of the program participants has the effect of providing the staff with “significant overall tasks” on a daily basis. Thus, in light of the Board’s reasoning in *Oakwood Healthcare*, the Program Coordinators’ authority constitutes “assignment.”<sup>3</sup>

The Program Coordinators also responsibly direct the staff in their Group Rooms. “Direction” of employees, unlike assignment, “may encompass ad hoc instruction to perform discrete tasks.” *Id.* at 689-690. Thus, “[i]f a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it,” then the person is “directing” others under Section 2(11). *Id.* at 691. Mere “direction” of employees will not qualify an individual as a “supervisor.” The individual must “responsibly” direct employees. In order to be “responsible,” the supervisor must be accountable and must have the ability to take corrective action when necessary. Also, there must be the prospect of adverse consequences for the

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<sup>3</sup> Indeed, in *Oakwood Healthcare*, the Board said the following regarding “assignment” under Section 2(11):

The power to assign an employee to one or the other is of some importance to the employee and to management as well. Certainly, in the health care context, the assignment of a nurse's aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee. It may also have a bearing on the employee's opportunity to be considered for future promotions or rewards. From the employer's perspective, matching a patient's needs to the skills and special training of a particular nurse is among those factors critical to the employer's ability to successfully deliver health care services.

*Id.* at 689. Certainly, the same can be said about the judgment used by Program Coordinators. After all, “matching a [participant’s] needs to the skills and special training of a particular [Case Manager] is among those factors critical to the employer’s ability to successfully deliver [Day Habilitation] services.” *Id.*

supervisor because of the direction. Thus, if employees fail to perform their delegated duties, the supervisor must face meaningful consequences.

As to whether the Program Coordinators “responsibly direct” the work of their staff, the Board’s analysis in *Oakwood Healthcare* again is instructive. There, the Board held that:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

*Id.*

There is no question that, under the facts of this case, this portion of the Board’s analysis is satisfied. The Program Coordinators have clearly been given the responsibility for delegating work to their staff and to direct the staff in their daily tasks. Moreover, the record reveals that the Program Coordinators are ultimately responsible for the actions of the staff under their supervision. Although the Acting Regional Director claimed that Program Coordinators were not responsible in the requisite sense because “the Employer provided only one example of a program coordinator suffering an ostensibly adverse consequence for case managers’ performance” (Decision at 7), that one instance is more than sufficient. Indeed, in this case, as the Acting Regional Director recognized, the Program Coordinators’ responsibility does not just create a “prospect of adverse consequences;” those consequences are quite real and have, in fact, been imposed when a Program Coordinator failed to properly supervise her staff. But even putting aside that evidence, the standard is not whether The Arc presented evidence of actual consequences (which it did) but whether The Arc presented evidence of a prospect of adverse consequences (which it also did). Tr. 218 (Testimony of Program Coordinator Austin Udemagwuna – “Q. All right – and why do you believe you’re held accountable? A. Because everything that happen in my group room I’m answerable to it. Whether it’s by omission or commission from any of the staff, you know, if they

don't do their job, I'm answerable – I'm held accountable for – for it.”). A showing of accountability requires only a showing of “a *prospect* of consequences,” and not a showing of *actual* consequences as erroneously mandated by the Acting Regional Director. *Golden Crest*, 348 NLRB 727, 731 (2006) (citing *Oakwood Health Care*, 348 NLRB 686, 692 (2006)).

Accepting the Acting Regional Director's decision that Program Coordinators are not responsible because there was only one instance of a Program Coordinator suffering adverse consequences would have the bizarre result that only individuals who otherwise perform the supervisory function of directing subordinates and are bad at their jobs will be considered statutory supervisors while those that perform their supervisory functions well will not be so considered. And, in any event and contrary to the Acting Regional Director's assertions, The Arc's evidence established that a Program Coordinator who fails to perform his or her supervisory duties over the staff is subject to discipline. There was no contrary evidence. Simply put, the Program Coordinators are held accountable for the direction they provide. Accordingly, there can be no dispute that the Program Coordinators responsibly direct their staff.

Turning to the final elements of the analysis, and again contrary to the Acting Regional Director, the record clearly demonstrates that the Program Coordinators exercise independent judgment in assigning and directing daily tasks, and that these tasks are not “rote” or routine in nature. To the contrary, the record shows that the Program Coordinators' discretion is an integral part of the success of their Group Rooms and that their ability to assign roles and delegate duties is a critical part of their responsibilities each day.<sup>4</sup>

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<sup>4</sup> The Acting Regional Director's reliance on state regulations to which The Arc is subject and purported “detailed instructions” in participants' Service Plans (Decision at 14) has absolutely no evidentiary support in the record. Indeed, even a cursory review of the regulations shows that there are no regulations stipulating any particular activities for program participants. *See* 130 CMR. 419.000 *et seq.* Nor is there any evidence in the record that participants' Service Plans set forth detailed activities. In fact, the only testimony regarding “detailed activities” in a Service Plan

According to the Board, there are two essential criteria of independent judgment: first, the individual must exercise that judgment without external control, and second, the individual must exercise judgment beyond that which is only routine and clerical. *Oakwood Health Care*, 348 NLRB 686, 692-694 (2006). In order for judgment to be beyond external control, at a minimum, a supervisor must act free from the control of others, and must be able to form an opinion “by discerning and comparing data.” *Id.* at 693. Judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* The presence of a policy, however, is not necessarily determinative. The real question is whether the policy allows for discretionary choices, or whether it removes the discretion from the individual’s control. *Id.*

In the instant case, and despite the Acting Regional Director’s belittling of the judgment they exercise, the Program Coordinators easily meet the Board’s statutory test. They make daily assignments for the staff under their control and have the unilateral authority to remove their subordinates from an existing assignment whenever required in their judgment. They assign duties based on their own judgment and perception of fairness, skills, and participant needs without regard to any established rotation or method. When faced with misconduct, Program Coordinators are authorized to use their own discretion as to whether to provide informal feedback to staff about performance problems or misconduct, provide verbal warnings and counseling or training, or conduct a “documented supervision,” which is a more formal level of discipline. They make these decisions independently and without approval from more senior management. Indeed, senior

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involved “community integration,” which aside from being a goal can obviously be accomplished through any number of different activities.

management is rarely present in the Group Rooms, which further attests to their independence. *See Mon Valley United Health Servs.*, 238 NLRB 916, 925 (1978) (“The parties did not reach agreement, however, regarding the supervisory status of the two resident managers in the Residential Living Program. The Employer contends that they are supervisors within the meaning of the Act, while the Petitioner avers that they are not. ... The fact that the program director normally is in his office during the day, while the majority of the activity in the homes occurs in the evening, further attests to the independent nature of the judgment exercised by the resident managers. Although the program director visits the homes several times a week, it is clear that he does not directly supervise the assistants in the performance of their duties. We, therefore, conclude that the resident managers are statutory supervisors and shall exclude them from the unit.”) They are held directly responsible for the actions of the staff they supervise, and their failure to adequately oversee or delegate could result in their own significant material harm, including being placed on a performance improvement plan, as the evidence showed that one Program Coordinator had been so disciplined. These tasks are not routine; they involve the Program Coordinators’ own discretion, their understanding of the functioning of their Group Rooms, and their ability to assess the needs of the participants in their Group Rooms and the activities best suited to help the participants achieve their goals on a daily basis.

The only way that the Acting Regional Director could have found otherwise is to focus on the admittedly rote tasks that Program Coordinators designate (such as toileting) and to ignore the evidence on how the Program Coordinators formulate, design, and implement activities to help program participants meet the goals prescribed in their Service Plans. That is exactly what the Acting Regional Director in this case did, indeed, going so far as to claim despite all of the evidence to the contrary that “[a]ssigning Case Managers to participants ... does not require an analysis of

a given Case Managers' skill set relative to the participant once both are already assigned to the room in question" (Decision at 12) even though the un rebutted evidence showed that the assignment of caseloads is based not only on the participants' needs but also on a Case Manager's fit with a particular participant. Because the Program Coordinators exercise this significant authority in order to ensure that their Group Rooms run smoothly and successfully, there can be no question that these individuals act in the interest of the employer, as well.

In all, the bulk of the evidence presented at the hearing showed the numerous decisions that the Program Coordinators make on a daily basis. Whether the Program Coordinator is assigning a participant to a particular Case Manager or a staff member to a particular task, determining which staff will perform specific activities or what activities will occur in his or her Group Room on any particular day, there are an enormous number of competing interests that must be resolved. Indeed, the fact that the Program Coordinators are held accountable for their supervision further underscores how important their exercise of independent judgment actually is, as attested by the fact that a Program Coordinator received discipline and was placed on a performance improvement plan relating to her direction of a staff member, reflecting that the Program Coordinator failed to exercise the independent judgment necessary to properly supervise her subordinates. Accordingly, there can be no question that the Program Coordinators exercise independent judgment in performing their jobs – and, as such, they must constitute statutory supervisors under the Act and thus be excluded from any unit found appropriate.

### **III. The Acting Regional Director Also Erred in Refusing to Consider Secondary Indicia.**

While secondary indicia cannot, by themselves, establish supervisory authority, "it is settled that secondary indicia, including the individual's job title or designation, as well as the perception of others that the individual is a supervisor may be used in making supervisory

determinations when evidence of primary indicia is present.” *Avante at Wilson, Inc.*, 348 NLRB 1056, 1061 (2006). The Arc does not quibble with the proposition cited by the Acting Regional Director that there is no need to assay evidence of secondary indicia of supervisory status if there is no evidence that an individual possesses any of the primary indicia. (Decision at 27.) Here, however, there was evidence that the Program Coordinators possessed primary indicia of supervisory authority. The Acting Regional Director simply decided not to consider that evidence or determined that there was not enough evidence. However, if the Acting Regional Director’s decision is right, there would never be a need to consider secondary indicia because the issue could be resolved on the basis of primary indicia alone.

Here, the record is replete with evidence of secondary indicia that confirms the supervisory status of Program Coordinators. For instance, Program Coordinators are responsible for preparing the performance appraisals of all staff that they supervise, and their comments are relied upon heavily by Knox and DeMeritt, who have little firsthand knowledge of the skills of the staff. Indeed, the Program Coordinators refer to themselves as “supervisors” when signing off on time off requests, performance evaluations, and community outing approval forms. (Ex. E-22(a)-E-22(f)), E-23-E-26, Ex. E-27(a)-E-27(e).) Program Coordinators participate in meetings with management that their staff do not attend. *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994) (attendance at supervisory meetings is secondary indicia). They also participate in supervisory training programs that Case Managers, Assistant Case Managers, and Relief Staff do not attend. *McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992) (attendance at management meetings and training sessions is indicative of supervisory status). Case Managers also view Program Coordinators as their boss. *Bama Co.*, 145 NLRB 1141, 1143 (1964) (how others view individual as supervisor is relevant). Finally, the Program Coordinators are salaried and are paid about \$6,000

more per year than Case Managers receive, who are hourly employees. *Am. Comm. Barge Line Co.*, 337 NLRB 1070, 1072 (2002) (receiving salary rather than hourly wage indicative of supervisory status); *Illini Steel Fabricators, Inc.*, 197 NLRB 303 (1972) (higher rate of pay indicia of supervisory status).

All of these secondary indicia constitute further evidence of the Program Coordinators' status as statutory supervisors, and the Acting Regional Director improperly ignored such evidence.

#### **IV. The Acting Regional Director Disregarded Evidence and Applied a Heightened Evidentiary Burden.**

The fundamental flaw in the Acting Regional Director's decision that Program Coordinators lack the supervisory authority to assign and responsibly direct their subordinates is that it disregards all of the evidence that Program Coordinators actually have that authority. "When the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). As such, the Board (and the Regional Directors and Acting Regional Directors to whom the Board has delegated its authority for representation case hearings) is mandated to draw all inferences suggested by the facts. And not only "must" the Board do so, but drawing such inferences is the Board's "obligation." *Id.* Here, the Acting Regional Director disregarded the testimony of Daniel Sullivan, Diane DeMeritt, Lisa Knox, Austin Udemagwuna, Kurt Boreri, Stefanie Furlong, and Ellen Wall that Program Coordinators possess authority to assign and responsibly direct the work of Case Managers, Assistant Case Managers, and Relief Staff. Tr. 32-33 (Testimony of Vice President Daniel Sullivan – "Q. Can you tell us what the program coordinator's job entails? What do they

do? A. The program coordinator is responsible for the overall operations of their room. Again, each room is unique. The individual is in the room. Unique schedules differ. It is the responsibility of the coordinator to lead the team of case manager, assistant case manager in meeting the needs of the program participants. They coordinate activities; oversee again the day-to-day operations of their room.”); Tr. 194-195 (Testimony of Program Coordinator Austin Udemagwuna – “Q. When you were a case manager, was your job different from your job as a program coordinator? A. Oh, absolutely. Q. In what way? A. In the sense that the Group 6, everything going on in Group 6 falls – I mean, it falls on me. I’m responsible for the running of the program in Group 6. And if anything goes wrong, Diane and Lisa would hold me accountable. Q. As the program coordinator? A. As the program coordinator. Q. Okay. A. But, as a case manager, I was answerable to the program coordinator that was there then.” ); Tr. 244-245 (Testimony of Case Manager Kurt Boreri – “Q. [D]o you have a caseload? A. Yes, I have five people. Q. And did someone assign you your caseload? A. Yes. Q. Who assigned you your caseload? A. Meryl [a Program Coordinator].”); Tr. 290 (Testimony of Program Coordinator and Union witness Stefanie Furlong – “Q. So, what happens if you all can’t agree? I mean, it sounds like you are running your room like – by committee. So, what happens if there’s disagreement among all of you? Does somebody have the ultimate responsibility to make a decision? A. Yes, ultimately. Q. Who? A. Myself.”); Tr. 346 (Testimony of Program Coordinator and Union witness Ellen Wall – “Q. So, you do have the authority to say to the case manager I don’t agree with what you want to do. I’m the program coordinator. I run this room. And I’m telling you not to do it, then it becomes a disciplinary issue and you would go to -- A. Right.” ); Tr. 392-393 (Testimony of Senior Associate Director Diane DeMeritt – “Q. – who in the Day Hab Program at the Arc has the authority to assign case managers an individual and assign the case manager their

caseload? A. The program coordinator has that authority to assign their case managers. Q. And has that – to your knowledge, has they – have they ever been overruled in their decisions? A. I cannot call [sic] a situation where they were overruled.”); Tr. 395-396 (Testimony of Program Director Lisa Knox – “Q. Are you aware of anybody other than the program coordinator who has the authority to assign the caseload to the case manager? A. No, I am not.”).

The only conclusion to draw from the Acting Regional Director’s decision is that while purporting to apply a preponderance of the evidence standard, he actually applied a higher standard. *See Oakwood Health Care, Inc.*, 348 NLRB at 694 (“The party seeking to prove supervisory status must establish it by a preponderance of the evidence.”). This is impossible to square with *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). There, the Court relied on the Administrative Procedure Act, 5 U.S.C. § 706, as a basis for invalidating the Board’s decision-making approach where the Board relied on decisions that consistently applied one standard despite stating that it was applying a different standard and rejecting “the Board’s allegedly systematic undervaluation of certain evidence, or allegedly systematic exaggeration of what the evidence must prove.” *Id.* at 378. The Court explained that the APA “establishes a scheme of ‘reasoned decision-making,’” which means that “[n]ot only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.” *Id.* at 374. Accordingly, the Court held the requirement of reasoned decision-making dictated that the standard announced must be the same as the standard actually applied:

It is hard to imagine a more violent breach of that requirement [of reasoned decision-making] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it.

*Id.* Yet this is precisely what the Acting Regional Director did: claim to apply a preponderance of the evidence standard while actually applying a greatly heightened standard.<sup>5</sup>

## CONCLUSION

One wonders after reviewing the Acting Regional Director's Decision and Direction of Election whether he engaged in a policy-driven effort to include the Program Coordinators in the bargaining unit. For certain jobs, the Board historically has manipulated the straightforward statutory terms to achieve policy-driven results. The Supreme Court rebuked the Board twice about misusing statutory factors to find that registered nurses are not supervisors. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994); *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706 (2001). The Supreme Court's theme in both of these cases was the Board "reached too far" by imposing an "overly narrow construction" of the definition of a supervisor. See *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 688 (2006). The *Kentucky River* Court referred to the Board's contrivances as "categorical," "startling," "troubling," and "strained." 532 U.S. at 710-717.

The same can be said for the Acting Regional Director's decision in this case. The salient facts are straightforward:

- Program Coordinators are responsible for the day-to-day activities in their rooms;
- Program Coordinators assign caseloads to Case Managers based on their assessment of participants' needs and Case Managers' experience and abilities;

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<sup>5</sup> Under the required burden of proof, The Arc was only required to present more evidence confirming the supervisory authority of the Program Coordinators than was presented to demonstrate otherwise. In short, The Arc was required to present evidence that it was more probable than not that its Program Coordinators were supervisors. However, one only need review the Acting Regional Director's decision to notice the failure of the Acting Regional Director to explain why the evidence relied upon outweighed the evidence to the contrary. Rather, the Acting Regional Director appears to have required "clear and convincing" evidence or evidence establishing "beyond a reasonable doubt" that the Program Coordinators were supervisors.

- Program Coordinators exercise independent judgment to decide which activities will enable participants to meet their goals; and
- Program Coordinators are held responsible for the job performance of their subordinates.

These facts alone establish that Program Coordinators are statutory supervisors. But if more is needed, secondary indicia of supervisory status further supports that they are supervisors:

- The Arc treats them as supervisors, paying them a salary like other senior managers in contrast to Case Managers who are hourly employees, and including the Program Coordinators in key decisions about the structure of the Day Habilitation Program and in The Arc's management training program; and
- Case Managers consider their Program Coordinator to be their supervisor with authority and control over the Group Room and the day-to-day work that the Case Managers perform.

In short, the Program Coordinator position is supervisory within the meaning of the Act. The Arc cannot be required to bargain with the Union over the terms and conditions of employment for this position.

Accordingly, the Board should reverse the Acting Regional Director's decision, hold that the Program Coordinators are statutory supervisors, and dismiss the Union's petition as seeking an inappropriate bargaining unit.

Respectfully submitted,

THE ARC OF SOUTH NORFOLK,

By its Attorneys,

/s/ John E. Duke

Andrew L. Eisenberg, Esq.

Telephone: (617) 849-7887

Facsimile: (617) 849-7879

*aeisenberg@constangy.com*

John E. Duke, Esq.

Telephone: (617) 379-3409

Facsimile: (617) 401-9495

*jduke@constangy.com*

CONSTANGY, BROOKS, SMITH & PROPHETE LLP

535 Boylston Street, Suite 902

Boston, MA 02116

Phone: (617) 849-7880

Dated: August 29, 2018

### CERTIFICATE OF SERVICE

I, John E. Duke, hereby certify that, on August 29, 2018, I served a copy of The Arc of South Norfolk's Brief on Review of the Acting Regional Director's Decision and Direction of Election on Joe DeLorey, Esq., General Counsel, AFSCME Council 93, Erin L. DeRenzis, Esq., Assistant General Counsel, AFSCME Council 93, and Acting Regional Director for Region 1 Paul J. Murphy by e-mail to Joe DeLorey at [jdelorey@afscme93.org](mailto:jdelorey@afscme93.org), Erin DeRenzis at [ederenzis@afscme93.org](mailto:ederenzis@afscme93.org), and Paul J. Murphy at [paul.murphy@nlrb.gov](mailto:paul.murphy@nlrb.gov).

/s/ John E. Duke  
John E. Duke